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No. 1083.

In the Supreme Court of the United States.

OCTOBER TERM, 1967.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
Petitioners,
v.
COMMONWEALTH OF MASSACHUSETTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION.

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Opinions Below.

The opinion of the Court of Appeals (Pet. 35-41) is reported at 384 F. 2d 819. The opinion of the District Court (Pet. 30-34) is reported at 266 F. Supp. 390.

Jurisdiction.

The judgment of the Court of Appeals (Pet. 41) was entered on November 8, 1967. The petition for writ of certiorari was filed on February 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented.

The Commonwealth of Massachusetts sought a declaratory judgment from the District Court that it was entitled to take property of a railroad in reorganization under 11 U.S.C. 205, without first obtaining the consent of the Interstate Commerce Commission or the court in which the reorganization proceedings were pending. On appeal, the Commonwealth conceded that it must first obtain the consent of the Commission. The question presented by the petition is thus narrowed to whether the Commonwealth also requires the prior consent of the reorganization court before proceeding with the eminent-domain taking.

Constitutional Provisions and Statutes.

The pertinent constitutional provisions and statutes involved are set out in the petition, pp. 3-10.

Statement.

By complaint (Pet. 47-50) filed with the United States District Court for the District of Massachusetts, the Commonwealth of Massachusetts (hereinafter "Commonwealth") sought a declaratory decree that it could take, by eminent domain, property of the Boston and Providence Railroad, then in reorganization pursuant to 11 U.S.C. 205, without first obtaining the consent of the Interstate Commerce Commission or the reorganization court. The Massachusetts Bay Transportation Authority joined the Commonwealth as a party plaintiff, and the Trustees of the New York, New Haven & Hartford Railroad Company were added as parties defendants at the instance of the Boston and Providence.

The land sought by the Commonwealth is to be used in "the development of a joint transportation corridor along the Southwest Expressway in Boston, Massachusetts" (Complaint, ¶ 3, Pet. 47). It is owned by the Boston and Providence, and was leased in 1888 to the Old Colony Railroad Company, which in turn leased it to the New Haven in 1893 (Complaint, ¶ 4, Pet. 47). Since 1938 the land has been operated by the New Haven for the account of the Boston and Providence (Complaint, ¶ 5, Pet. 48). The land sought to be acquired consists of a seven-mile strip running southerly from Ruggles Street, Boston, to the Hyde Park section of Boston (Complaint, ¶ 6, Pet. 48; Pet. 51).

Answers and counterclaims were filed by both the Boston and Providence and the New Haven (Pet. 55-56), and various motions to dismiss the complaint and counterclaims and for summary judgment were filed with the District Court (Pet. 66-71). An agreed statement of facts (Pet. 72-77) was filed with the District Court, and on April 13, 1967, the District Court issued its opinion, holding that the Commonwealth was required to obtain the consent of both the Interstate Commerce Commission and the reorganization court prior to commencing an eminent-domain taking (Pet. 30-34).

On appeal to the Court of Appeals, the Commonwealth conceded that it was required to obtain the consent of the Commission, but argued that consent of the reorganization court was not necessary. The Court of Appeals agreed. The court reasoned that the Commonwealth possesses a "special inchoate interest or right, which is paramount to any interest of the debtor in the property" (Pet. 40). That being the case, "with respect to the state's prescriptive rights the court could effect none of the alterations or take any of the actions ordinarily contemplated in a reorganization proceeding. At the most, it could order the state not to

proceed." (*ibid.*). The court also determined that to give the reorganization court the power to approve commencement of the eminent-domain proceeding would merely be to give that court a "temporary veto," and it observed that the postponement of public rights during the period of reorganization (noting that the Boston and Providence had been in reorganization for twenty-nine years) "is not appealing" (Pet. 41). The Court of Appeals thought that such a postponement "would not viably improve the prospects of the estate and would be broadly improvident" (*ibid.*). The petition for writ of certiorari followed.

Argument.

The petition presents no substantial question warranting further review by this Court. The decision below—which is supported by a carefully reasoned opinion—is correct. Petitioners assert that this Court should grant certiorari (1) to resolve a conflict created between the decision below and decisions of the Fourth and Eighth Circuits and (2) to decide an important question of federal law decided incorrectly by the court below and not heretofore passed on by this Court. These arguments, which are treated in reverse order, are without merit.

I. The Consent of the Reorganization Court is Not a Prerequisite to Commencement of an Eminent-Domain Proceeding.

This case involves the narrow question of whether a state, prior to commencing an eminent-domain proceeding in a state court in which land of a railroad in reorganization will be taken, must obtain the additional consent of the District Court in which the reorganization proceedings are pending.

(It is conceded that the state must, in any event, obtain the approval of the Interstate Commerce Commission.) The Court of Appeals held that such consent was not required, and the decision below should be left undisturbed.

In attacking the decision of the court below, petitioners contend that the portion of 11 U.S.C. 205(a) which delineates the jurisdiction of the reorganization court requires that the Commonwealth obtain the consent of the reorganization court prior to the commencement of an eminent-domain proceeding. Petitioners seize on the words of the section that the reorganization court shall "have exclusive jurisdiction of the debtor and its property wherever located, * * *" (11 U.S.C. 205(a), Pet. 4). Petitioners argue that the "exclusive jurisdiction" in the reorganization courts "empowers those courts generally to deal with all matters affecting the estate of the bankrupt railroad" (Pet. 17). Petitioners, however, overlook the qualifications found in the statute that the exclusive jurisdiction is limited "during the pendency of the proceedings under this section" and "for the purposes thereof." The court below recognized these limitations:

> "It is true that section 77(a) [11 U.S.C. 205(a)] provides that the court shall have 'exclusive jurisdiction of the debtor and its property wherever located, * * *' but the court [the District Court] failed, at least overtly, to consider the qualifying phrase, 'during the pendency of the proceedings under this section and *for the purposes thereof,*' (emphasis ours). In view of this limitation its reference to bankruptcy as a 'paramount national function' seems too easy an answer. Indeed, we have already held that where there is no sufficient purpose the bankruptcy court's jurisdiction is not exclusive." (Pet. 36-37.)

The Court of Appeals then proceeded to discuss the functions of the reorganization court, which are to prevent diminution of assets, achieve an equitable adjustment among claimants, and preserve the corporation as a going concern (Pet. 37-38). The court concluded that the Interstate Commerce Commission was charged with protecting the special public interest emanating from the fact that the business under reorganization was a railroad, and that the reorganization court had no greater powers than in any other reorganization proceeding (Pet. 38). In the light of these considerations, the ultimate conclusion of the Court of Appeals follows: there is no "purpose" to be served by giving the reorganization court a veto over the commencement of eminent-domain proceedings.

The result reached by the Court of Appeals does not in any way detract from the powers of the reorganization court. Rather, it strikes a balance between the duties of the Interstate Commerce Commission, on the one hand, and the court, on the other. The special expertise of the Commission will be brought to bear on problems affecting the general public interest with which the railroad is imbued, and the specialized functions conferred on the reorganization court will remain intact. The decision below is both logical and practical, and no further review is warranted.

Petitioners also argue that the court below failed to consider the provisions of section 77(o) of the Bankruptcy Act (11 U.S.C. 205(o)). That section, however, deals with voluntary petitions brought by trustees to abandon railroad lines, and it has no bearing whatsoever on the exercise of the power of eminent domain. Petitioners argue that the section should not be restricted to voluntary petitions by trustees, "since it is the *effect* of the removal of property from the railroad which Congress has decreed that the court should consider, * * *" (Pet. 22). Aside from the

fact that the section is phrased in terms of the bringing of voluntary petitions, petitioners overlook the express requirement of the section that "the approval and authorization of the [Interstate Commerce] Commission" must be obtained prior to an abandonment or sale of railroad lines, a requirement which indicates that the Commission and not the reorganization court is to consider the "effect" of the abandonment. The decision below, we note, permits any special interest which the railroad may assert in opposition to a taking to be considered by the Commission.

II. The "Conflict" Created by the Decision Below is Not Sufficient to Warrant the Grant of Certiorari.

Petitioners make much of the "conflict" created by the decision below, asserting that it is in direct conflict with the decision by the Eighth Circuit in *Chicago, Rock Island & Pacific Railroad Co.* v. *City of Owatonna,* 120 F. 2d 226 (8th Cir. 1941), and the decision of the Fourth Circuit in *Buckhannon & Northern Railroad Co.* v. *Davis,* 135 F. 707 (4th Cir. 1905). *Buckhannon* involved a petition by the Buckhannon Railroad to institute condemnation proceedings with respect to properties of the Parkersburg Branch Railroad, then in receivership. Petitioners assert that the Buckhannon Railroad "attempted to take by eminent domain some properties of the Parkersburg Railroad without obtaining permission of the federal court * * *" (Pet. 15). Quite to the contrary, the railroad "filed its petition * * * asking permission to institute and prosecute in the circuit court of Taylor county, W. Va., certain condemnation proceedings against the said receiver * * *" 135 F. at 708. It is thus obvious that the issue decided by the court below was never raised or considered in *Buckhannon,* for in that case it was conceded that permission of the court was necessary.

We concede that the result reached in the *City of Owatonna* case twenty-seven years ago is directly opposite from the result reached by the court below. In that case, the Eighth Circuit held that permission of the bankruptcy court is a prerequisite to commencement of condemnation proceedings. However, the Eighth Circuit did little more than state the proposition. The opinion offers no supporting rationale, whereas the court below provided a painstaking and careful discussion of its reasons for holding that permission of the reorganization court is not required.

While it is correct that this Court will grant certiorari to resolve conflicts between the various Courts of Appeals, such grants are usually reserved where two or more Courts of Appeals contemporaneously reach different results. See *United States* v. *Minker*, 350 U.S. 179 (where this Court resolved a conflict between the Second and Third Circuits as to the proper construction to be accorded § 235(a) of the Immigration and Nationality Act of 1952, reversing the former and affirming the latter), and *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, and *Safeway Stores, Inc.*, v. *Vance*, 355 U.S. 389 (where this Court resolved a conflict between the Seventh and Tenth Circuits as to whether a violation of section 3 of the Robinson-Patman Act provides the basis for a suit for treble damages and injunctive relief under the Clayton Act, affirming the former and reversing the latter).

The "conflict" here is not contemporaneous, nor is it a conflict in rationales. It is a conflict in results only, and those twenty-seven years apart. And this is not the case where the Court of Appeals reversed a District Court decision premised on a line of prior federal decisions. See *Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (where this Court granted certiorari to resolve the conflict between the decision of the Ninth Circuit and prior

decisions of federal courts upon which the District Court had relied). As the paucity of precedent indicates, the precise question posed by the petition has arisen most infrequently in the past and is unlikely to arise frequently in the future. This is an added reason why this Court should decline to review the judgment below.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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